Supreme Court, U.S.
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No. 98-1407

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DONALD P. HUMPHRESS,

Petitioner,

v.

UNITED PARCEL SERVICE, INC. and GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 89,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT UNITED PARCEL SERVICE, INC.

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QUESTIONS PRESENTED

1. Whether in a hybrid action under § 301 of the Labor Management Relations Act (29 U.S.C. § 185), evidence that the grievant failed to follow the advice of his union in having his grievance heard could allow a finding that the union violated its duty of fair representation?

2. Whether an individual has exhausted his administrative remedies in a hybrid § 301 action, when the grievant dismissed his grievance in settlement and later attempts to reinstate that same grievance instead of filing a separate grievance regarding the company's alleged failure to comply with the settlement agreement which dismissed the first grievance?

3. Whether a state law claim of retaliation, predicated upon the company's response or alleged lack thereof to reported safety violations, is preempted by § 301 where the collective bargaining agreement provides the rights and duties of the parties in reporting and responding to allegations of safety violations?

STATEMENT PURSUANT TO RULE 29.6

Respondent United Parcel Service, Inc. is a subsidiary of U.P.S. of America and has no nonwholly owned subsidiaries.

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United States Supreme Court Rule 10c 10

Respondent United Parcel Service, Inc. respectfully submits that Petitioner has failed to allege or provide any cognizable grounds for this Court's review of the Opinion of the Sixth Circuit Court of Appeals, entered November 30, 1998.

STATEMENT OF THE CASE

Humphress has been employed by United Parcel Service, Inc. ("UPS") as a package car driver for nearly thirty years in Campbellsville, Kentucky. Local Union 89 ("Local 89") of the General Drivers, Warehousemen, and Helpers ("Teamsters") is the collective bargaining representative for the bargaining unit in which Humphress works. Humphress served as a union steward for Local 89 from 1985 to 1992.

On February 28, 1994, Humphress completed a Driver Vehicle Inspection Report to report numerous alleged safety violations with the package car he operated that day. In response to the long list of reported problems, mechanic Steve Hughes wrote, "I don't have time for the bull____ . . ."

Article 18 of the National Master Agreement provides the procedures and rights of reporting and responding to safety concerns in operating UPS equipment. This article includes much of the federal regulations governing safety and operation of commercial vehicles.

The next day, Humphress arrived at work to find that his gear shifter had been removed. Humphress had previously installed a modified shifter to alleviate pain from his "tennis elbow." (R. 10, Humphress Deposition, Vol. II, p. 119). Hughes changed the shifter back to original manufacturer specifications, per the instructions of UPS Regional

Automotive Manager, Larry Combs, who had ordered the Campbellsville facility to return all vehicles to original manufacturer specifications. (R. 60, Clark Deposition, p. 41).

Humphress alleged that Hughes began to harass him by placing grease on his vehicle and tying plastic bags in knots. Humphress informed center manager Vince Elliot, who personally investigated and found no evidence of sabotage or harassment. (R. 65, Elliot Deposition, p. 59). Elliot also had the company's Loss Prevention department investigate the complaints, but nothing was found. (R. 65, Elliot Deposition, pp. 58-59). Humphress also complained to other company and union officials, who investigated and found nothing. (R. 60, Clark Deposition, pp. 37, 39; R. R. 59, Wolfe Deposition, pp. 34, 36).

On April 3, 1994, Humphress filed a grievance to get back his shifter. In his grievance, Humphress also sought relief in the form of termination or discipline for Hughes, starting an educational program and implementation of regular safety communications. Humphress later received in the mail an intra-union grievance against him filed by Hughes when Hughes found out that Humphress' grievance sought Hughes' termination.

Humphress was told by Local 89 business agent Larry Wolfe that Wolfe could get Hughes to drop the intra-union grievance if Humphress would agree to withdraw his grievance in settlement for UPS's agreement to attempt to find a suitable shifter. (R. 9, Humphress Deposition, Vol. I, pp. 33-34). Humphress agreed, and withdrew his grievance as settled. (R. 10, Humphress Deposition. Vol. II, p. 144).

UPS attempted to find a suitable shifter for Humphress, trying four different shifters, none of which Humphress approved. (R. 10, Humphress Deposition, Vol. II, pp. 280-281). Humphress spoke with Wolfe about reinstating his grievance. Wolfe told Humphress that he needed to file a new and separate grievance, stating that UPS had failed to live up to its agreement. (R. 10, Humphress Deposition, Vol. II, p. 148). Wolfe stated that the previously withdrawn grievance was dismissed and could not be reinstated. Humphress admits that he did not heed this advice and instead attempted to reinstate his previously withdrawn grievance. (R. 10, Humphress Deposition, Vol. II, pp. 148-49). Humphress states that he took this course of action on the advice of his counsel. (R. 10, Humphress Deposition, Vol. II, p. 273) True to Wolfe's advice, the reinstated grievance was denied as previously dismissed.

Humphress alleges that there was evidence of bias against him within the union because of his political affiliation. However, there was no such evidence, other than Humphress' conclusory speculation.[1] (R. 10, Humphress Deposition, Vol. II, pp. 222-23, 227).

Humphress filed suit in the United States District Court for the Western District of Kentucky. He alleged a hybrid § 301 claim against UPS and Local 89, a claim under the Kentucky Civil Rights Act, and several other state law claims.

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1. The "evidence" that Local 89 representative had told Center Manager Tom Mouser to terminated Humphress is unsubstantiated hearsay advanced by Humphress in an affidavit in contradiction of earlier deposition testimony. (R. 10, Humphress Deposition, Vol. II, p. 199; R. 48, Affidavit of Mouser attached to UPS's Reply Memorandum).

The District Court granted summary judgment on all claims, but the state civil rights act claim, which was dismissed without prejudice. Humphress appealed to the Sixth Circuit Court of Appeals, which affirmed the trial court's opinion in a *per curiam* opinion.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT AMONG THE CIRCUITS OR LOWER COURTS IN INTERPRETATION OF THE BURDEN OF PROOF FOR A HYBRID § 301 CLAIM.

Humphress claims that this Court should grant the writ of certiorari because he asserts there is a conflict among the lower courts regarding the burden of proof in hybrid § 301 claims. Humphress cites the case of *Thomas v. United Parcel Service, Inc.*, 890 F.2d 909 (7th Cir. 1989), in an attempt to demonstrate a conflict. However, not only is the *Thomas* case readily distinguishable from the facts of this case, but the lower courts' opinions and reasoning is entirely consistent with the decision of the Seventh Circuit. Regardless, Humphress' allegations, even accepting his characterization of the evidence, do not demonstrate a conflict among the lower courts.

In *Thomas*, the Seventh Circuit remanded the decision of the District Court where the plaintiff alleged that the union breached its duty of fair representation in representing him before a joint grievance panel. The Seventh Circuit reversed the trial court's grant of summary judgment, where the trial court failed to consider evidence of bias based upon union politics. Thomas was a vocal supporter of a party within the Teamsters. Thomas produced statistical evidence that

grievances filed by members of his same party had a much higher chance of being denied by the joint panel than those filed by non-members of that party. Thomas also produced expert evidence that the different success rates were statistically significant based upon political affiliation. Thomas also produced evidence that his business representative responsible for processing his grievance had attended a rally opposing Thomas' party and had signed a leaflet opposing that party. Finally, Thomas also produced evidence that the two union members who sat on the joint panel also signed the same leaflet and attended the same rally. *Id.* at 913.

The Seventh Circuit held that it was error for the trial court not to have considered this evidence in deciding summary judgment on the hybrid § 301 claim. Significantly, the Seventh Circuit did not hold that the evidence submitted by Thomas was sufficient to prove a beach of the duty of fair representation, but merely that the District Court erred in refusing to consider such evidence. *Id.* at 923.

Humphress claims that the facts of *Thomas* are "virtually identical . . . to the present case. . . ." This complete mischaracterization demonstrates the weakness of Humphress' claims. Most importantly, the trial court and appellate court both considered Humphress' claims of union political bias and found no evidence thereof. Therefore, this case is indeed consistent with the holding of *Thomas*. Secondly, the facts as proven by Humphress fall far short of any demonstration of bias as compared to those in *Thomas*. Thomas proved actual bias with statistics and biased acts by the union members at issue in that case. Humphress' only "fact" is that he was a vocal member and a candidate under the same party as Thomas. There is no evidence, statistical

or otherwise, that members of Humphress' party were more likely to have their grievances denied than other union members. There is no evidence that any union official referenced in this case harbored any animus toward Humphress' party. At best, Humphress' allegations amount to paranoia. Such unfounded allegations cannot carry the burden to overcome summary judgment.

The single overriding fact of this case is Humphress' admitted refusal to follow his union's advice, which proved accurate. (R. 10, Humphress Deposition, Vol. II, pp. 148-49, 273). As the trial and appellate courts held, Humphress should not be heard to complain that filing the proper grievance would be futile when the union told what him to do and how to do it. This fact alone makes review by this Court unnecessary.

Humphress further suggests that this Court should review this case

> to explain, what deference, if any, a union is entitled to when processing an individual's grievance when the interests of the individual is synonymous with the interests of group.

He appears to argue that the Court should issue an opinion to explain what he sees as unclear area of the Seventh Circuit opinion. Such is obviously not the province of this Court. Regardless of the questionable merit of this argument, Humphress should be estopped from arguing it here on appeal, as he did not raise any such argument in either of the lower courts.

II.

HUMPHRESS DID NOT EXHAUST HIS ADMINISTRATIVE REMEDIES.

In this Section of his Petition, Humphress asks the Court to define the circumstances under which a Union may advise a member to file a new grievance. Respondent agrees that the trial court found, and the Sixth Circuit affirmed, that by not following the Union's advice and filing a grievance to request enforcement of the earlier alleged settlement agreement, Humphress failed to exhaust his contractual remedies, barring this action. Again, Petitioner seems to seek an advisory opinion. It is not necessary for the Court to define each and every circumstance under which a Union may give advice to one of its members. It was enough in this case that the Union told him that, rather than attempt to revive his earlier grievance, the result of which would be a denial by the joint panel, he should seek to file a new grievance to force the earlier alleged settlement. He chose not to do so and should not be heard now to complain that the Union correctly advised him what would happen if he ignored its advice.

Humphress argues that both lower courts misapplied *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967), by requiring him to have filed another grievance. Despite explanation by Local 89, UPS, the District Court and the Court of Appeals, Humphress still does not understand this issue. Humphress filed a grievance to get back his shifter which was removed. He withdrew his grievance in settlement. The settlement of this grievance involved UPS attempting to find a suitable shifter. This acted as a final and binding decision upon the grievance. Humphress himself admitted that once a grievance is dismissed, it cannot be reinstated.

(R. 10, Humphress Deposition, Vol. II, p. 149). When Humphress was not happy with the shifters UPS tried, his grievance was no longer that his shifter had been removed. Now, his grievance was that UPS was not living up to its agreement. Humphress was told this by his union, but he ignored the advice. Indeed, he continues to ignore and dispute the same reasoning in the District Court and the Court of Appeals.

This issue is not one for the Supreme Court to take up on review. Humphress should have filed a new grievance, as instructed by his union, to take issue with UPS' attempts to find a suitable shifter. The prior grievance, the removal of his modified shifter, was settled and dismissed by the parties. Humphress' conscious failure to file this recommended grievance is fatal to his claim.

III.

HUMPHRESS COULD NOT PROVE THAT FOLLOWING THE UNION'S ADVICE WOULD BE FUTILE.

Humphress asks the Court in this Section to decide whether the grievance which the Union suggested, and which Humphress declined to file, would have been futile. Specifically, he asks the Court to determine whether the filing of a new grievance would be futile when the original grievance was barred. As noted above, that issue was not presented below and may not be initially brought here.

However, more to the merits, it was for this very reason that the Union suggested Humphress file a "new grievance", alleging a failure to comply with an earlier settlement

agreement. He chose not to do so. As such, this phantom issue seems moot. Humphress' circular logic cannot change the fact that he admits knowingly refusing the accurate union advice.

IV.

HUMPHRESS' STATE LAW CLAIMS ARE PREEMPTED BY § 301.

Section IV states no alleged errors of law or conflicts with other Circuit Courts of Appeals. Humphress simply disagrees with the trial court's opinion that his claim of retaliatory conduct required interpretation of the collective bargaining agreement. Humphress asks this Court to grant certiorari to decide whether a

> state law claim is pre-empted when a collective bargaining act simply copies and incorporates statutes and regulations which form the basis of a state law claim.

He further asks this court to decide whether "the court was obligated to take proof of the necessity of interpretations, rather than rely on statements." Again, neither issue was presented to the trial court or the Court of Appeals and may not initially be pursued in this Petition.

However, again to the merits of his argument, Respondent suggests that where Humphress alleges a wrongful act (that UPS removed his gear shift) and where UPS claims that it has the right to do so under the collective bargaining agreement, it is hard to imagine Humphress disputing that an interpretation of the collective bargaining agreement is necessary.

In the second request of this section, Humphress asks the court to rule that the trial court was obligated to take live proof rather than rely on statements as a basis for its summary judgment. Humphress thus asks the Court to ignore Federal Rules of Civil Procedure 56(c) which provides that the court may base its summary judgment on "pleadings, depositions, answers to interrogatories, . . . admissions on file, [and] affidavits." Indeed, Humphress supplied no less than twenty-eight (28) affidavits in response to the motions for summary judgment. (R. 45, Humphress' Combined Memorandum in Opposition, Exhibits G-J). This argument is without merit.

CONCLUSION

There is no dispute that Humphress was unhappy with his union and that he decided to ignore its good advice. The union correctly predicted to him that his course of conduct would lead to a denial of his grievance by the joint panel on the basis that it had been sold at an earlier date. All Humphress had to do was take the union's advice and his grievance would have been resolved to his satisfaction or, had it not been, he would not be subject to a motion for summary judgment on the issue of whether he had exhausted his contractual remedies. Choices have consequences. Humphress' choice here, for whatever reason, led directly to the entry of summary judgment against him.

Humphress has shown no conflict of laws among or between the Circuits nor any of the other considerations listed in Supreme Court Rule 10a, b, and c, which justify this Court granting his Petition.

For all of the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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